U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 August 2006

CASE NO.: 2006-ERA-00023

In the Matter of

CHARLES G. SYSKO,
Complainant,

v.

PPL CORPORATION and
PPL SUSQUEHANNA, LLC,
Respondents.

ORDER FINDING NO GOOD CAUSE TO APPLY EQUITABLE TOLLING AND DISMISSING COMPLAINT AS UNTIMELY FILED

The instant matter concerns a complaint of discrimination alleging violation of the whistleblower protection provisions of the Energy Reorganization Act, codified at 42 U.S.C. §5851 et seq., ("the Act").

Procedural History

On March 22, 2006, Charles G. Sysko ("Complainant"), through counsel, filed a complaint against PPL Corporation and PPL Susquehanna, LLC ("Respondents") with the United States Department of Labor's Occupational Health and Safety Administration ("OSHA"). On June 23, 2006, OSHA issued its findings upon investigation that the complaint was without merit. On July 14, 2006, Complainant, through counsel, requested review of that determination by the Office of Administrative Law Judges ("OALJ"). The case was then assigned to me.

Upon receipt of the pleadings, I observed that the request for review by OALJ was not filed within five business days of OSHA's determination, as required by 29 C.F.R. §24.4(d)(2). That regulation provides in pertinent part:

> The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination.

29 C.F.R. §24.4(d)(2). Accordingly, by Notice and Order issued July 21, 2006, I directed Complainant to Show Cause why his complaint should not be dismissed as untimely filed. On July 25, 2006, Complainant filed his response to my Order to Show Cause. On July 31, 2006, Respondents filed correspondence that I have construed to be a motion to dismiss the complaint as untimely filed.

Factual History

Complainant's complaint with OSHA was filed on his behalf by his attorney Kimberly Borland. See, letter dated March 21, 2006. OSHA conducted an investigation, and issued Findings on its investigation, which were forwarded to Complainant on June 23, 2006. In a letter accompanying the Findings, which was addressed to Complainant and dated June 23, 2006, OSHA advised the parties that they had "30 days from the receipt of these findings to file objections and to request a hearing before an Administrative Law Judge (ALJ)." See, letter of June 23, 2006, ¶ 2. Although a notation[1] on the third page of OSHA's determination letter suggests that Complainant's attorney was not sent a copy of the findings, in his response to my Order, Complainant provided a copy of a letter dated June 26, 2006, from OSHA to her. In that correspondence, Regional Supervisory Investigator forwarded OSHA's findings, and advised counsel that Complainant "has 5 days to file an appeal with the Administrative law Judge". See, letter of June 26, 2006, ¶ 1. In Complainant's response to my Order to Show Cause, Attorney Borland asserted that she received the letter from OSHA but did not receive a copy of the findings until she contacted OSHA. She spoke with an OSHA employee who confirmed that she had thirty days to request a hearing. She received the findings by facsimile on June 30, 2006, and filed the request for hearing on July 14, 2006.

Discussion

The Third Circuit Court of Appeals[2] addressed the issue of the timely filing of a whistleblower case brought under the Toxic Substances Control Act, 15 U.S.C. §2622(b), in School District of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981). The Court in Allentown established three circumstances where deadlines that operated as statutes of limitations may be equitably tolled: 1) where the complainant was actively misled by the respondent regarding the cause of action; 2) where the complainant was prevented from asserting his rights in some extraordinary way; or 3) where the plaintiff raised the statutory claim in the wrong forum. Id. at 19-20.

Observing that "statutes of limitations and other similar filing deadlines should be equitably modified only in exceptional circumstances", the Administrative Review Board ("ARB") applied the Allentown Court's rationale to complaints of discrimination under the Energy Reorganization Act in Charles Hill, et. al and Edna Ottney v. Tennessee Valley Authority, 97-ERA-23 at 23-2, 87-ERA-27 (Sec'y April 21, 1994). The ARB has stated that the principle of equitable tolling may apply in other circumstances in addition to those stated by the Allentown Court: where (1) a claimant has received inadequate notice; (2) a motion for

[1] The notation reads: "cc: Respondent
Administrative Law Judge, USDOL"

[2] The instant case arises within the geographic area of the Third Circuit's jurisdiction.

appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted on; or (3) the court has led the plaintiff to believe that he had done everything required. Spearman v. Roadway Express, Inc., 92-STA-1 (Sec'y Aug. 5, 1992), citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam); Irwin v. Veterans Administration, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990).

The Board has held that the time limit for filing a request for hearing is not jurisdictional, and is subject to the principles of equitable tolling. See, Shelton v. Oak Ridge National Laboratories, et al., ARB Case No. 98-100, March 30, 2001; Reid v. Niagara Mohawk Power Corporation, ARB Case No. 03-154, October 19, 2004; Howlett v. Northeast Utilities, ARB Case No. 99-044, March 13, 2001. Therefore, the fact that Complainant failed to comply with the time limits set forth at 29 C.F.R. 24(d)(2) does not automatically bar adjudication of his complaint. I must determine whether equitable tolling applies in these circumstances.

Complainant argues that because OSHA's notice provided erroneous information that was confirmed by discussion with an OSHA employee, his request for hearing should be deemed timely filed. Complainant's request was filed within the thirty day period that was referenced in OSHA's forwarding letter. Respondents' argument suggests that counsel's reliance upon erroneous advice from OSHA does not constitute equitable tolling of the period within which a request for hearing must be filed.

I find that the circumstances before me do not meet the limited grounds for granting relief from the filing time requirement of 29 C.F.R. §24.4(d)(2). There is no evidence that Complainant was actively misled by Respondents with respect to some aspect of the claim, nor was Complainant prevented from asserting his rights. Complainant did not file his request in a timely fashion in the wrong forum, and he was notified of the defect in his filing immediately upon assignment of his case within OALJ. I further find that the very fact that counsel was involved in Complainant's complaint since its inception precludes equitable tolling. Counsel is presumptively aware of the law and regulations applicable to the cause of action. Citing, among other precedents, a decision of the Third Circuit Court of Appeals, Kocian v. Getty Refining & Marketing Co., 707 F.2d 748 at 755 (3d Cir. 1983, cert. denied, 464 U.S. 852 (1983)), the ARB found equitable tolling inappropriate where Complainant has consulted counsel during the period. Mitchell v. EG&G et al., 87-ERA-22 (Sec'y July 22, 1993). Counsel's constructive knowledge is further imputed to Complainant. Id. at 5.

I further am not persuaded that OSHA's defective notice to Complainant is sufficient to invoke equitable estoppel. A subsequent cover letter from OSHA to Complainant's counsel provided the correct information. Rather than resolving the contradictory notices by consulting the regulations, which are readily available to the public, and should be particularly accessible to an attorney, Complainant's counsel verbally asked for clarification of the time requirements from an OSHA employee. I rely upon the ARB's conclusion that acting upon erroneous information from an agency employee would not satisfy the requirements of equitable tolling, because it demonstrates "a lack of diligence on [Complainant's] part which cannot justify a tolling." Mitchell, supra., at 6. As the ARB observed, only affirmative misconduct by a government agency, and not mere negligence, supports estoppel. Id. The Supreme Court long ago warned litigants that one relies upon the government at one's peril, and that ignorance of the law does

not merit equitable tolling. FCIC v. Merrill, 332 U.S. 380 (1947).

I acknowledge the harsh result that will occur from my determination that grounds do not exist in this case to extend the time period established for complainants to request a hearing under the Act. I am aware that at least one ARB member, E. Cooper Brown, has suggested that where an agency is charged with acting in the public interest, such as adjudicating environmental whistleblowing complaints, extension of filing deadlines may be warranted. Concurrence in Howlett, supra. at 3 and 4, (citing the Supreme Court's holding in American Farm Lines v. Black Ball Freight Services, 397 U.S. 532 at 539, that an administrative agency has discretion to modify time limitations in the interest of justice, if an opposing party would not be prejudiced.) However, I find that this case warrants the application of the general rule against applying equitable tolling when a Complainant has legal representation. See, Kocian, supra at 745-55.

Conclusion

In consideration of the filings of the parties, the statute, regulations and applicable law, I find that Complainant has not shown good cause that his request for hearing was timely filed, or that equitable tolling applies. Accordingly, Complainant's appeal should be dismissed, and OSHA's determination should be the final order of the Secretary.

Because of my determination in this matter, Respondents' motion for a continuance of the hearing scheduled in this matter is moot.

RECOMMENDED ORDER

It is hereby recommended that the appeal and request for hearing filed by Charles G. Sysko be dismissed and the determination rendered by OSHA be recognized as the final order of the Secretary.

The hearing now scheduled in this matter is canceled.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. §24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. §24.7(d).